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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE ARNOLDO MOLINA-NUNEZ, Defendant and Appellant.	E047247 (Super.Ct.No. FVI801623) OPINION

APPEAL from the Superior Court of San Bernardino County. Robert J. Lemkau, Judge. Affirmed.

Richard de la Sota, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr. and Marcella O. McLaughlin, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Jose Molina-Nunez guilty of one count of committing a lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a), count 1), and nine counts of annoying or molesting a child under the age of 18 (Pen. Code, § 647.6, subd. (a)(1), counts 2-10). The trial court found true the allegation that defendant had one prior strike conviction. (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i).) The court sentenced him to a total term of 24 years in state prison.

On appeal, defendant contends the trial court abused its discretion in admitting evidence of his prior sex offense under Evidence Code section 1108.[1] We disagree and affirm.

FACTUAL BACKGROUND

The underlying crimes involved defendant and K.M. (the victim), daughter of defendant's wife. The victim was 11 years old at the time of the incidents. The victim testified as follows: Defendant was her stepfather. On Monday, April 28, 2008, the victim was at home watching television when defendant came into the room with a condom in his hand. Defendant asked the victim if she knew what a condom was. The victim said she did not know. Defendant told her to stick out her finger. He placed the condom on her finger. Defendant told the victim not to tell her mother about it. The victim's mother was not home. The victim felt scared.

[1] All further statutory references will be to the Evidence Code unless otherwise noted.

The next day, the victim came home from school and went swimming with her little sister in their pool. The victim's mother was not home. Defendant was taking a shower, and, after the victim got out of the pool, he asked her to bring him his clothes. The victim went to the bathroom door to give him his clothes, and defendant opened the door all the way to expose his naked body. The victim felt scared because she thought he was going to pull her into the bathroom. The victim gave him his clothes and left.

The following day, on Wednesday, the victim went swimming again in her pool. She and her two younger sisters were in the pool, throwing a little doll toy. Defendant was playing in the pool with them. At one point, defendant took the doll and put it inside his shorts. He pointed to his shorts and asked the victim to take the doll out of his shorts. The victim felt scared and did not want to get the doll.

Later that same day, the victim took a shower and then wrapped a towel around herself. Defendant came into the bathroom with the victim's little sister and told her to give her sister a shower. The bathroom door was closed, and the victim was scared that defendant was going to do something bad to her.

That same day, defendant took a shower and asked the victim for his clothes again. He opened the door all the way and stood there naked. The victim's mother was not home.

Later that night, the victim was mopping the kitchen floor and then knocked on the bathroom door, which was closed. She wanted to go into the bathroom to wring out the mop. No one answered when she knocked, and she left the mop by the bathroom door.

Then, defendant came out of the bathroom and stood in front of the door naked. The victim's mother was not home, and the victim felt scared.

The next day, the victim came home from school. Her little sister wanted to go swimming. The victim did not go swimming because she was scared of defendant. She went into her mother's room to watch cartoons, and defendant entered the room. He changed what she was watching and played what she described as "porno things" on the television. Defendant sat down and started asking about her private parts. Defendant asked the victim if she "shaved it down there." The victim said no. Again, the victim's mother was not at home.

The next day, on Friday, the victim was in her mother's room on the bed watching cartoons again. The victim's mother was not home. Defendant came into the room and touched the bottom of the victim's leg. He rubbed her leg and massaged her back with his hands. The victim was scared because of all the things that had been happening with defendant the past few days. Defendant started talking to her and asked if she wanted him to rub her "booty." She said no, and he left the room. He came back into the room and put his hand on her inner thigh, right below her crotch, and rubbed it for about one minute.

On another day that week, the victim was lying down with her sister under a blanket. They were watching television. Defendant came into the room and lay down next to the victim, under the blanket. The victim was on her back, and defendant was on

his side facing her. He then put his leg on top of her legs for several minutes. He told her that her breasts were going to look like her mother's.

The victim also testified regarding an incident that occurred before that week. She was taking off her clothes to take a shower when she saw defendant looking at her through a small window. The victim felt scared of him because he was watching her. The victim further recalled a time when defendant asked the victim if his penis was too big or too small.

At trial, defendant's niece, I., also testified. She testified that in June 1994, when she was 13 years old, defendant visited her home. One day, I. and her sister were home with defendant while the rest of her family was out running errands. I. was taking a shower. Before she got in the shower, she shut and locked the door. However, she noticed the door was open, so she turned off the shower and grabbed a towel. She went to close the door, when defendant walked into the bathroom wearing only his underwear. He said to her, "I know you don't like me. We never got along." He threatened to hit her if she screamed, and then he took the towel off of her and forced her onto the floor. Defendant took off his underwear and told her to open her legs or he would sock her. He had intercourse with her and then left. I. told her mother what happened, and her mother called the police. I. eventually testified against defendant in court.

Defendant testified on his own behalf at trial, and contradicted all accounts of the incidents described by the victim. He said that the victim was the one who brought the condom to him and asked him what it was. He admitted that, on two occasions, the

victim brought him his clothes when he got out of the shower. However, he said he only opened the door a little bit, so he could get his clothes. He denied that he asked her to bring him his clothes. Defendant said the victim was the one who wanted to push the door open a little more. Regarding the pool incident, defendant said that he and the victim and her sister were playing with the doll, and they threw it at him. He took it and hid it in his pocket. He said he noticed the victim "going towards" his legs so he reprimanded her for it. He further denied putting on a pornographic movie while the victim was watching cartoons. He also denied massaging her back or rubbing her thigh, and he denied ever looking at the victim through the bathroom window. Regarding I., defendant admitted that he was charged with having forcible intercourse with someone under 14 years of age. He admitted having sex with I., but denied that he forced her.

ANALYSIS

The Court Properly Admitted the Evidence of Defendant's Prior Sexual Misconduct Under Section 1108

Defendant contends the court abused its discretion in admitting I.'s testimony because the incident with her was remote in time and dissimilar to the offenses in the instant case. Defendant further contends the evidence was more prejudicial than probative. The People counter that the evidence was admissible to show defendant's propensity to commit sexual offenses. We conclude there was no abuse of discretion.

A. *Background*

Prior to trial, the prosecution made a motion to admit I.'s testimony regarding defendant's sexual assault of her. The motion sought admission of the testimony under section 1108 as propensity evidence. The prosecution argued that defendant forced I., who was a 13-year-old Hispanic girl with whom he had a familial relationship, to have sex with him. In the instant case, the victim was an 11-year-old Hispanic girl, who was defendant's stepdaughter. In both cases, defendant waited until nobody was home, except younger children, to make contact with these victims. Defense counsel objected to the admission of I.'s testimony, arguing that the offense was committed 12 years before the trial in the instant case, and there was no evidence that defendant had committed any offense since then. The court took a recess and took the matter under submission. The court reviewed the cases cited by defendant, as well as *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*). In rendering its decision, the court noted that the Supreme Court in *Falsetta* stated that sex crimes were usually committed in seclusion, and the ensuing trial often presented conflicting versions of the event and required the trier of fact to make credibility determinations. Section 1108 provides the trier of fact the opportunity to learn of the defendant's possible disposition to commit sex offenses. The court then stated that it reviewed the instant case under section 352 and found that the probative value of the section 1108 evidence was not substantially outweighed by the possibility that it would consume an undue amount of time or create a substantial danger of undue prejudice, of confusing the issues, or misleading the jury.

Thus, after weighing the issues under sections 1108 and 352, the court decided to admit the evidence.

B. *Relevant Law and Standard of Review*

As a general rule, evidence of a defendant's conduct is not admissible to show disposition or propensity, but is admissible to prove identity, plan, intent, knowledge, or opportunity. (§ 1101.) Section 1108 provides a statutory exception, allowing propensity evidence to be admitted in sex offense cases to show a defendant is more likely to have committed the charged offense. (*Falsetta*, *supra*, 21 Cal.4th at p. 911.) Therefore, if the uncharged conduct is a sex offense, it is admissible subject to section 352. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1315.) The trial court weighs the probative value against the potential risk of prejudice, confusion, and undue consumption of time. (*Ibid*.) On appeal, we review the trial court's ruling for an abuse of discretion. (*Ibid*.)

C. *There Was No Abuse of Discretion*

As noted by the court below: "[T]he Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes. [Citation.]" (*Falsetta*, *supra*, 21 Cal.4th at p. 915.)

Here, defendant and the victim presented conflicting versions of what occurred between them. Defendant denied any wrongdoing, and placed blame on the victim for any questionable activity (i.e., he said that she brought the condom to him and that she reached toward his legs to retrieve the doll from his shorts). The trial essentially came down to a credibility contest, and I.'s testimony was necessary to inform the jury of defendant's disposition to commit sex crimes. (*Falsetta, supra,* 21 Cal.4th at p. 915.)

Defendant claims the court erred in admitting I.'s testimony because of the dissimilar nature of the past and current occurrences. He cites *People v. Harris* (1998) 60 Cal.App.4th 727 *(Harris*). In *Harris,* the defendant was a mental health nurse, and the current incidents involved him committing sexual assaults on two of his patients. He was accused of preying on women who were vulnerable due to their mental health conditions. (*Id.* at pp. 730-732.) The court allowed the prosecution to introduce evidence under section 1108 that the defendant had been convicted in an earlier case of entering a stranger's apartment and brutally sexually attacking her. (*Id*. at p. 734.) The appellate court reversed the judgment, finding that section 1108 was remote, and the evidence was not probative since the degree of similarity between the prior incidents and current incidents were totally dissimilar. (*Id*. at p. 740.)

The dissimilarities between defendant's prior offense and current offenses in the instant case are nothing like the dissimilarities between the prior and current offenses in *Harris.* In *Harris,* the evidence that the defendant committed a violent rape of a stranger was not similar at all to the current offenses involving the sexual assaults of defendant's

patients, who were vulnerable due to their mental health conditions. (*Harris, supra,* 60 Cal.App.4th at pp. 730, 734.) In contrast, I.'s testimony presented evidence of prior sexual conduct that was similar to the incidents described by the victim, in that defendant took advantage of being alone (or without other adults) in the house with a young female relative. The victim was his 11-year-old stepdaughter, and I. was his 13-year-old niece. Defendant points out that he had sex with I. by force and against her will. However, he states that his conduct with the victim was either passive or verbal, and there was no force involved. While we recognize there were differences in defendant's actions against the victim and I., we consider the sexual nature of defendant's misconduct, along with the similar circumstances, to be significant. Moreover, the past and current offenses were all ones defined as qualifying "sexual offenses" under section 1108, subdivision (d).

Defendant also argues that the sexual offense with I. was remote in time. "No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible." (*People v. Branch* (2001) 91 Cal.App.4th 274, 284.) "Remoteness of prior offenses relates to 'the question of predisposition to commit the charged sexual offenses.' [Citation.] In theory, a substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses. However, . . . significant similarities between the prior and the charged offenses may 'balance[] out the remoteness.' [Citation.] Put differently, if the prior offenses are very similar in nature to the charged offenses, the prior offenses have greater probative value in proving propensity to commit the charged

offenses." (*Id*. at p. 285.) Here, despite the passage of time between offenses, the propensity evidence was extremely probative of defendant's sexual misconduct when left alone with young female relatives, and is exactly the type of evidence contemplated by the enactment of section 1108.

Defendant finally asserts that he was prejudiced by the introduction of I.'s testimony because the jury "had a number of factual disputes to resolve, and there was no corroborating evidence supporting [the victim's] testimony . . . ." Defendant has identified the precise reason for the admission of section 1108 evidence. As discussed above, "sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence." (*Falsetta*, *supra*, 21 Cal.4th at p. 915.) Thus, the intent of section 1108 is "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*Id*. at p. 911.)

We also note that the record did not reveal any undue consumption of time by the subject evidence or any reason for the jury to be confused by I.'s relatively brief testimony.

We conclude the trial court properly admitted evidence of defendant's prior sexual conduct pursuant to sections 1108 and 352. The probative value of the propensity evidence outweighed any prejudicial effect of such evidence.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

MILLER
J.